STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GORBE,

Plaintiff-Appellant,

v

TCF BANK,

Defendant-Appellee.

UNPUBLISHED
September 10, 2009

No. 286084
Wayne Circuit Court
LC No. 08-100578 CD

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We reverse the trial court's grant of summary disposition and remand for discovery. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who is Caucasian, began his employment with defendant as a business banker. He was assigned to a group of branches. Plaintiff claims that when he was hired, he was told that he was being "groomed" to oversee the business banking operations in the Westland areas of Wayne County and in the soon-to-be-opening Dearborn Heights and Allen Park branches. When the Allen Park and Dearborn Heights branches opened, they were grouped together with an already-existing branch in Belleville (the Dearborn cluster). At the time the Dearborn cluster was formed, another employee of defendant, Ms. Habbas-Nimer, held the position of business banker for the Belleville branch. Plaintiff claims he requested to be transferred to the position of business banker for the Dearborn cluster, although Bob Borgstrom, defendant's executive vice president for Michigan as well as its director of retail banking, claims plaintiff never formally requested the transfer. Ultimately, the position servicing the Dearborn cluster went to Habbas-Nimer. Plaintiff claims that defendant chose Habbas-Nimer because "she was/is of Middle Eastern descent, thereby supposedly making her more appealing to the large Middle Eastern population in Dearborn and Dearborn Heights" and denied him the position because he was "Caucasian and, presumably, not of Arabic or middle eastern descent." Borgstrom's affidavit states that Habbas-Nimer's new position was a "lateral move" and not a promotion for her or plaintiff–had he received the position–because it was "not accompanied by a raise in pay or a change in job duties or job title." During discovery, plaintiff admitted in his response to defendant's interrogatories that had he received the position, his job title would likely have remained the same and that his base pay and "incentive schedule" would not have changed. Nevertheless, plaintiff claims that the position would have been a promotion because of the greater earning potential and new business opportunities available in areas where branches were

not yet established. Plaintiff also claims his job duties would have been "drastically different" because, according to plaintiff, the focus of a business banker's position in a new area shifts from "maintaining relationships to sales and promotional duties."

Plaintiff filed suit alleging that defendant violated the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*., by making plaintiff's race, nationality, and/or sex the decisive factors in its decision to place another employee, instead of plaintiff, into a position plaintiff believed he deserved. Defendant moved for summary disposition, arguing that the position plaintiff desired would have amounted to a "lateral transfer" and the denial of a lateral transfer does not, as a matter of law, constitute an adverse employment action. The trial court granted defendant's motion[1] and dismissed plaintiff's case with prejudice.

Plaintiff argues that the trial court granted summary disposition in favor of defendant prematurely because discovery was not complete. We agree.

We review de novo a trial court's decision on summary disposition. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "[S]ummary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000).

Plaintiff filed his complaint in early January 2008. Defendant's motion for summary disposition was filed less than two months later and heard April 25, 2008. A scheduling order was not even entered until April 11, 2008, a mere two-weeks before the motion for summary disposition was heard. The scheduling order appears to create a discovery deadline of August 19, 2008.[2] Given that defendant answered the complaint February 11, 2008, from start to finish, plaintiff had less than three months within which to conduct discovery and was denied almost four more months granted by the scheduling order. We can conceive of very few circumstances under which this would be an adequate period of discovery upon which to base a motion for summary disposition under MCR 2.116(C)(10).[3] In any event, we conclude that based on the record, there was a reasonable chance that further discovery would result in factual support for plaintiff.

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[1] For the purposes of this appeal, we assume that the trial court granted the motion pursuant to MCR 2.116(C)(10).

[2] There is an entry for the scheduling order in the trial court's register of actions, but the actual order was not provided in the record. The entry provides, in part "DISC 8 19 08." It is from this entry that we believe the discovery deadline to be August 19, 2008.

[3] We recognize that the standard is not based on amount of time provided for discovery, but on whether there is a reasonable chance that further discovery would result in factual support for plaintiff's claim. Nevertheless, we wish to note our concern about the trial court's grant of summary disposition so early in the process.

To establish his prima facie case of discrimination under the CRA, plaintiff was required to prove that: (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he suffered the adverse employment action under circumstances that give rise to an inference of unlawful discrimination. *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999).

As to the first factor, all employees are inherently members of a protected class because all persons may be discriminated against. *Haynie v Dep't of State Police*, 468 Mich 302, 308; 664 NW2d 129 (2003). Therefore, plaintiff is a member of a protected class.

For the second factor, in order for an employment action to be considered adverse, two requirements must be met. First, "the action must be materially adverse in that it is more than mere inconvenience or an alteration of job responsibilities." *Wilcoxon*, *supra* at 364 (internal quotations and citations omitted). Second, "there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another are not controlling." *Id.*

Defendant alleged that the transfer was a lateral transfer, such that there was no adverse employment decision. For a job transfer to be a lateral transfer and, therefore, not an adverse employment decision, the positions must be the "substantial equivalent" of each other, giving the employee virtually identical promotion opportunities, compensation, job responsibilities, working conditions and status. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 797; 369 NW2d 223 (1985). Our review of the record indicates that plaintiff alleged that there was "increased earning potential" at the Dearborn cluster that did not exist at the location where he worked because the "primary method by which business bankers make money for [defendant] and earn bonuses" is by opening new accounts in a "warm market." Thus, plaintiff clearly alleged that the Dearborn cluster position would have resulted in an increase in his total compensation, even though his salary and benefits would have remained the same.

The fact that plaintiff's incentive schedule remained the same did not preclude evidence that the Dearborn cluster could provide more opportunities to take advantage of the incentive schedule. Indeed, that is precisely plaintiff's point. If one area is tapped out in terms of ability to earn a bonus, an area where the potential to make bonuses exists is clearly a position with increased earning ability and, therefore, can be considered a position with increased compensation. The trial court failed to consider that simply because plaintiff's salary, benefits and incentive schedule remained the same, his total compensation may have changed. Given how many jobs have a low base salary because they are based on the assumption that the employee will earn bonuses or tips, we emphasize that the standard is total compensation, not salary. Whether plaintiff suffered an adverse employment decision is a disputed issue. If plaintiff was, in fact, discriminatorily denied a position with a greater ability to earn bonuses, and, therefore increased total compensation, then he has a reasonable chance of uncovering evidence documenting that. See *Oliver v Smith*, 269 Mich App 560, 568; 715 NW2d 314 (2006).

As to the third factor, given defendant's assertions that the Dearborn cluster position was identical to plaintiff's, there appears to be no question that plaintiff was qualified for the position, such that it is reasonable that further discovery would plaintiff will be able to support this position.

As to the fourth factor, plaintiff alleged that several of defendant's employees informed plaintiff that the decision not to transfer him to the Dearborn cluster was because he was not the right race or religion. Given adequate time for discovery, it is reasonable that plaintiff will have depositions and other evidence that will support this position.

Given the state of the evidence and the allegations as they existed at the time the trial court granted summary disposition, there was a reasonable chance that further discovery would support plaintiff's claim. Accordingly, the trial court improperly granted summary disposition. *Colista*, *supra*. "[P]laintiff is entitled to have the entire period of discovery to compile [] records, affidavits, opinions, and other evidence to support his claim." *Oliver*, *supra*. If it desires, at the end of discovery, defendant can bring another motion for summary disposition. *Id.*

Reversed and remanded for discovery. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro